Supreme Court, U.S.
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No. 99-91

IN THE

Supreme Court of the United States

PETER D. DEMPSTER, JR.,

Petitioner,

v.

WASTE MANAGEMENT, INC., an Illinois corporation, t/a WASTE MANAGEMENT OF PITTSBURGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Waste Management, Inc. has changed its name to Waste Management Holdings, Inc. Waste Management Holdings, Inc. is a wholly owned subsidiary of USA Waste Services, Inc., a public corporation traded on the New York Stock Exchange. No shareholders own greater than 10% of the outstanding shares of USA Waste Services, Inc. In July, 1998 USA Waste Services Inc., changed its name to Waste Management, Inc.

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STATEMENT OF THE CASE

A. Procedural History.

The Petition for Writ Certiorari filed by Petitioner, Peter D. Dempster, Jr., requests this Honorable Court to review the Pennsylvania Supreme Court's holding affirming the dismissal of Petitioner's action pursuant to the Pennsylvania Workers' Compensation Act. 77 Pa. C.S.A § 1, *et seq*. Petitioner inaccurately identifies the question for review as whether the "Pennsylvania courts violated the constitutionally protected property rights of the Petitioner by engrafting onto his employment agreement, the statutory immunity provisions of the Pennsylvania Workers' Compensation Act . . ." As detailed below, the Pennsylvania Superior Court accurately affirmed the trial court's decision that Petitioner's action was barred by the immunity provisions of the Pennsylvania Workers' Compensation Act; and the courts below never engrafted the statutory immunity provisions of the Pennsylvania Workers' Compensation Act into Petitioners' Employment Agreement.[1] The lower courts accurately determined that the contract between Network Industrial Inc. ("Network") and Waste Management, Inc. ("Waste Management") was not definitive of whether Petitioner was an employee of Waste Management as defined by the Pennsylvania Workers' Compensation Act, and Petitioner's Petition for Writ of Certiorari should be dismissed.

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1. Petitioner alleges for the first time that he had an Employment Agreement. However, Network and not Petitioner contracted with Waste Management. Petitioner did not have a written contract with Waste Management.

Petitioner initiated this action by filing a Complaint in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking damages for injuries that he allegedly sustained while working on a refuse truck, owned and operated by Waste Management. On or about April 30, 1999, the Honorable Judge Wettick of the Court of Common Pleas of Allegheny County, Pennsylvania, issued an Opinion and an Order dismissing Petitioner's action on the basis that it was barred by the provisions of the Pennsylvania Workers' Compensation Act. 77 Pa. C.S.A. § 1, *et seq*.

Petitioner filed an appeal with the Superior Court of Pennsylvania, and on or about January 8, 1999, the Superior Court of Pennsylvania entered an Order and issued an Opinion affirming the lower court's decision dismissing Petitioner's action. Petitioner filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. However, the Supreme Court of Pennsylvania declined to entertain the merits of Petitioner's appeal, and denied Petitioner's Petition for Allowance of Appeal. Petitioner subsequently filed a Petition for a Writ of Certiorari with this Honorable Court seeking review of the state courts' decisions.

B. Factual Background.

Petitioner had been referred to Waste Management by Network a temporary employment agency, after responding to an advertisement placed by Network, requesting applications from people interested in becoming garbage collectors.

On or about March 8, 1996, Petitioner was injured while working on a refuse truck, owned and operated by Waste

Management. Throughout the proceedings, Petitioner consistently averred and the evidence confirmed, that Waste Management controlled the work that he performed and the manner that he performed his work. The Court of Common Pleas of Allegheny County, Pennsylvania entered an Order and issued an Opinion dismissing Petitioner's action on the grounds that Waste Management was Petitioner's employer, and immune from liability under the provisions of the Pennsylvania Workers' Compensation Act. 77 Pa. C.S.A § 1, *et seq*. The Superior Court of Pennsylvania accurately identified the issue on appeal as whether Waste Management was Petitioner's employer under the provisions of the Pennsylvania Workers' Compensation Act, and therefore immune from liability. The Superior Court of Pennsylvania accurately determined that Waste Management was Petitioners' employer as defined by the provisions of the Pennsylvania Workers' Compensation Act, since it controlled the work that he performed and the manner in which he performed his work. The trial court and the Superior Court of Pennsylvania, consistent with well established case law in Pennsylvania, also accurately determined that the contractual provisions between Network and Waste Management did not control whether Petitioner was Waste Management's employee for the purposes of the Pennsylvania Workers' Compensation Act. 77 Pa. C.S.A. § 1, *et seq*.

As detailed below, the Pennsylvania Superior Court accurately affirmed the trial court's decision that Petitioner's action was barred by the immunity provisions of the Pennsylvania Workers' Compensation Act. Petitioner inaccurately asserts that the courts below violated his constitutional rights by altering the terms of his Employment Agreement. However, Petitioner never had an employment

agreement with Waste Management. Further, the lower courts accurately determined that the contract between Network and Waste Management was not definitive of whether Petitioner was an employee of Waste Management under the Pennsylvania Workers' Compensation Act, and Petitioner's Petition for Writ of Certiorari should be dismissed.

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILED TO RAISE ANY UNITED STATES CONSTITUTIONAL ISSUES WITH THE LOWER COURTS BELOW AND THEREFORE, THEY HAVE BEEN WAIVED.

Petitioner asserts that the lower courts' holdings are violative of the United States Constitution. However, Petitioner failed to raise these issues with the trial court, and the Superior Court of Pennsylvania, and therefore they have been waived. In fact, Petitioner did not even reference the United States Constitution one time in his Appellate Brief to the Superior Court of Pennsylvania. In this regard, the sole issue that Petitioner presented to the Superior Court of Pennsylvania was:

> Can a business waive, by contract with a temporary agency, its right to plead defenses under the Workers' Compensation Act as to injuries sustained by a worker assigned to the business entity by the temporary employment agency.

The only time that Petitioner previously referenced the United States Constitution in the record, was in his Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which was denied.

The United States Supreme Court held that a federal question must be raised and decided in the state court below before it may have jurisdiction over an appeal. *Hill v. California*, 91 S. Ct. 1106, 1111, 401 U.S. 797 (1971). In that case, the United States Supreme Court held that:

> Finally, in his Brief in this Court, Petitioner argues that the admission in evidence . . . violated the Fifth Amendment . . . Counsel for Hill conceded at oral argument that the Fifth Amendment issue was not raised at trial. Nor was the issue raised, briefed or argued in the California appellate courts. The Petition for Certiorari likewise ignored it. In this posture of the case, the question, although properly briefed and argued here, is not properly before us.

Hill, 91 S. Ct. at 1111, U.S. at 806.

Moreover, neither the trial court, the Pennsylvania Superior Court, nor the Pennsylvania Supreme Court addressed any federal constitutional issues in their opinions and/or orders. The United States Supreme Court recently held that when the state's highest court is silent on a federal question, there is a presumption that the issue was not properly presented, and Petitioner must rebut the presumption by demonstrating that the state court had a full and fair opportunity to adjudicate the federal question. *Adams v. Robertson*, 520 U.S. 23, 117 S. Ct. 1028 (1997). The Court stated that:

> With very "rare exceptions", we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioners' federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review . . . Nor have petitioners met their burden of showing that the issue was properly presented to that court. When the highest court is silent on a federal question before us, we assume that the issue was not properly presented. . . .

Adams, 117 S. Ct. at 1029; citing *Heath v. Alabama*, 474 U.S. 82, 87 106 S. Ct. 433, 436-437 (1985); *Illinois v. Gates*, 462 U.S. 213, 217, 103 S. Ct. 433, 436 (1983).

Similarly, Petitioner did not raise a federal question until he filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. Waste Management contested Petitioner's argument on the grounds that it was improperly raised with the Court, because Petitioner had not previously raised any federal constitutional issues. While the Pennsylvania Supreme Court was silent on its reasons for denying the Petition for Allowance for Appeal, a presumption is established that Petitioner did not properly raise the federal constitutional issue, and Petitioner's Petition should be denied.

II.

PETITIONERS' PETITION FOR ALLOWANCE OF APPEAL DOES NOT PRESENT ANY REASONS SUFFICIENT FOR THIS COURT TO GRANT CERTIORARI, AND IT SHOULD BE DENIED.

Petitioner's Petition for Allowance of Appeal should be denied because it does not present any reasons sufficient for this Court to grant Certiorari in this matter pursuant to 28 U.S.C. § 1257. In this regard, 28 U.S.C. § 1257 sets forth the instances when this Court should grant Certiorari. The section provides as follows:

> (a) Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or whether the validity of a statute of any state is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or any title, right, privilege or immunity is specifically set up or claimed under the Constitution or the treaties or the statutes of any commission held or authority exercised under the United States.

28 U.S.C. § 1254.

A. The Lower Court's Holdings Do Not Violate Any of the Parties' Constitutionally Protected Property Rights.

Petitioner inaccurately asserts that the Pennsylvania courts violated his constitutionally protected property rights by "engrafting onto his employment agreement" the statutory immunity provisions of the Pennsylvania Workers' Compensation Act. To the contrary, the lower courts simply determined that the contractual terms between the parties did not control the identity of Petitioner's employer under the Pennsylvania Workers' Compensation Act and did not alter the contractual terms that existed between the parties.

As the lower court accurately stated, the Pennsylvania Workers' Compensation Act, 77 Pa. C.S.A. § 1, *et seq.*, creates a comprehensive system whereby workers are ensured compensation for work-related injuries under *state* law. *Wagner v. National Indemnity Co.*, 492 Pa. 154, 422 A.2d 1061 (1980). In exchange for the protection of the employee's rights, the Pennsylvania Workers' Compensation Act provides that its remedies are exclusive to workers who seek redress for work-related injuries. *Workers' Compensation Appeal Board v. Overmyer Mold Co.*, 473 Pa. 369, 374 A.2d 689 (1977). Specifically, Section 481 of the Pennsylvania Workers' Compensation Act provides, in pertinent part, "the liability of an employer thereunder shall be exclusive, and in place of any and other liability to such employees . . ." 77 Pa. C.S.A. § 481(a). Further, "in the event injury or death to an employee is caused by a third party, then such employee may bring his action at law against such third party, but the employer shall not be liable to the third party for damages . . ." Thus, pursuant to the Pennsylvania Workers' Compensation Act, Petitioner's statutory employer is immune from civil suit for damages arising from work-related injuries.

The courts in Pennsylvania have frequently encountered the issue of whether an employee of one company who is assigned to another for employment is considered to be an employee of the first or second company under the Pennsylvania Workers' Compensation Act. The appellate courts in Pennsylvania have consistently held that the test to determine whether the employee is employed by the first company or the second company is to decide which company had the right to control the work of the employee as well as the manner in which he performed the work.

The Pennsylvania Supreme Court set forth the test for determining whether an employer-employee relationship exists under the Pennsylvania Workers' Compensation Act in *JFC Temps, Inc. v. W.C.A.B.*, 545 Pa. 149, 680 A.2d 862 (1996). The court held that:

> The test for determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only of the work to be done but also to the manner of performing it. The entity possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised.

JFC Temps, 680 A.2d at 864.

Importantly, the Superior Court of Pennsylvania held that the lay definition of the term "employer," is not the same definition of an employer under the Pennsylvania Workers' Compensation Act. *Wilkinson v. K-Mart*, 412 Pa. Super. 434,

603 A.2d 659 (1992). In that case, Plaintiff was an employee of Transco Corp. ("Transco"), who was operating a truck for the K-Mart Corporation ("K-Mart") pursuant to a contract between K-Mart and Transco which categorized Plaintiff as Transco's employee. Plaintiff was injured while unloading his truck. Plaintiff initiated a personal injury action against K-Mart, alleging that it had negligently loaded the truck. K-Mart filed a motion for summary judgment asserting that, despite the language of its contract with Transco, to the contrary, it was plaintiff's employer under the borrowed servant doctrine. The trial court entered summary judgment in favor of K-Mart and the Superior Court of Pennsylvania affirmed its decision.

The court held that K-Mart was plaintiff's employer because K-Mart controlled the work that plaintiff was required to perform and the manner that he performed the work. Thus, regardless of the contract language, K-Mart was plaintiff's employer under the Pennsylvania Workers' Compensation Act.

The court stated that:

> The crucial test in determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done, but also to the manner of performing it. A servant is the employee of the person who has the right of controlling the manner of his performance of the work . . .

Id.

Similarly, in this case, the lower courts' holdings did not influence, affect or impede any of Petitioner's Constitutional rights. The well established case law interpreting the provisions of the Pennsylvania Workers' Compensation Act, and not terms set forth in any private contract, dictate whether Petitioner was Waste Management's employee under the provisions of the Pennsylvania Workers' Compensation Act, and Petitioner's Petition should be denied.

CONCLUSION

For the reasons noted above, the Petition should be denied.

Respectfully submitted,

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